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# THE JOURNAL OF NEGRO HISTORY

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## PRIMITIVE LAW AND THE NEGRO

The psychology of large bodies of men is a surprisingly difficult topic and it is often true that we are inclined to seek the explanation of phenomena in too recent a period of human development. The truth seems to be that ideas prevail longer than customs, habits of dress or the ordinary economic processes of the community, and the ideas are the controlling factors. The attitude of the white man in this country toward the Negro is the fact perhaps of most consequence in the Negro problem. Why is it that still there lingers a certain unwillingness, one can hardly say more, in the minds of the best people to accept literally the platform of the Civil War? Why were the East St. Louis riots possible? I am afraid that a good many of the Negro race feel that there is a distinct personal prejudice or antipathy which can be reached or ought to be reached by logic, by reason, by an appeal to the principles of Christianity and of democracy. For myself I have always felt that if the premises of Christianity were valid at all, they placed the Negro upon precisely the same plane as the white man; that if the premises of democracy were true for the white man, they were true for the black. There should be no artificial distinction created by law, and what is much more to the purpose, by custom simply because the one man has a skin different in hue than the other. Nor should the law,

once having been made equal, be nullified by a lack of observance on the part of the whites nor be abrogated by tacit agreements or by further legislation subtly worded so as to avoid constitutional requirements. Each man and woman should be tested by his qualities and achievements and valued for what he is. I am sure no Negro asks for more, and yet I am afraid it is true, as many have complained, that in considerable sections of this country he receives far less.

I have long believed that we are concerned in this case with no reasoned choice and with no explainable act, but with an unconscious impulse, a subconscious impulse possibly, with an illogical, unreasonable but powerful and inexplainable reaction of which the white man himself is scarcely conscious and yet which he feels to be stronger than all the impulses created in him by reason and logic. What is its origin? Is there such a force? I think most will agree there is such an instinctive aversion or dislike.

I am inclined to carry it back into the beginnings of the race, back to the period of pre-historic law and to that psychological origin which antedates the records of history, in the strict sense, to that part of racial history indeed where men commonly act rather than write. The idea of pre-historic law is that obligation exists only between people of the same blood. Originally, charitable and decent conduct was expected only of people of the same family. Even though the family was by fact or fiction extended to include some hundreds or even thousands of people, the fact was still true. The law which bound a man limited his good conduct to a relatively few people. Outside the blood kin he was not bound. He must not steal from his relatives, but if he stole from another clan, his relatives deemed it virtue. If he committed murder, he should be punished within his clan, but protected, if possible, by his clan, if he murdered someone outside it. The blood kin became the definite limitation of the ideas of right and responsibility. This was true between whites. All whites were not members of any one man's blood kin.

Palpably more true was this distinction between the Negro and the white man. The Negro could not by any fiction be represented as one of the blood kin. The Romans extended the legal citizenship to cover all white men in their dominions. It was the fictitious tie of the blood kin, but its plausibility was due to the fact that they were all white. I do not remember to have seen any proof that the Negro inhabitants of the Roman African colonies were considered Roman citizens. This is one of the oldest psychological lines in human history; the rights which a man must concede to another are limited by the relationship of blood. *Prima facie* there could be no blood relationship between the Negro and the white man. There could therefore be no obligation on the white man's part to the Negro in pre-historic law. This notion has, I think, endured in many ways down to the present day as a subconscious, unconscious factor behind many very vital notions and ideas. Is it not true that international law has been, more often than not, a law between white men?

The next point I hesitate somewhat to make because it is difficult to state without over-emphasis and without saying more than one means. I think it probable that in one way or another the idea of Christianity became connected with the notion of the blood kin and in that sense limited to the blood kin of those to whom Jesus came. Everyone is familiar with the Jewish notion that Jesus was their own particular Messiah, and that the Gentiles were foreclosed claims upon him. As Christianity grew, it grew still among the white nations, and the notion of it was not, I think, extended for a good many centuries to any except white people. The premises of Christianity unquestionably included the Negro, but the notion of the blood kin excluded him, and Christianity, like other religious ideas, was limited to the people who first created it and to those who were actually or by some plausible fiction their kin in blood. The idea of the expansion of the blood kin by adoption either of an individual or of a community of individuals was very old and thoroughly well established, but I think the idea

never was applied to Negroes, Indians, or Chinamen except in unfrequent cases of individuals. A volume would be required to bring forward all the available evidence regarding this idea, and another perhaps to examine and develop it, to consider and weigh the *pros* and meet the *cons*. But it will perhaps suffice for present purposes to throw out the idea for consideration without an attempt at more considerable defense.

Another fact which has been most difficult to explain has been the continued lynchings of Negroes not merely for crimes against women, but for all sorts of other crimes, large and small. Here the traces of primitive law are very much clearer. Lynching is after all nothing more nor less than the old self-help. The original notion was that the individual should execute the law himself when he could, and that he was entitled in case of crime to assistance from the community in the execution of the law upon the offender. Murder, arson, rape and the theft of cattle were the particular crimes for which self-help by the individual and by the community in his assistance were authorized by primitive law. The preliminaries and formularies were very definite, but they do not look to us of the present day like procedure. It is true, however, that there are very few lynchings in which these formulas have not been unconsciously followed. There must be a hue and cry and pursuit along the trail. The murderer must be immediately pursued. The person against whom the crime is committed or his next of kin must raise an immediate outcry, and they and the neighbors must proceed at once in pursuit. If they caught the criminal within a reasonable distance or within a reasonable time, they then were endowed by primitive law with the right to execute justice upon him themselves. Commonly the criminal was hanged (even for theft) when caught in the act, but barbarous punishments were not uncommon. That was legal procedure, provided the cry was raised, the pursuit undertaken, and the criminal caught within a reasonable number of hours or days as the case might be. The mob had the right to execute the law, and

it is not often that lynchings take place long periods after the commission of the crime. Such for many centuries was the law in Europe for whites. Self-help applied in particular to men of different tribes or communities who were not of the same blood kin.

If self-help applied under certain conditions within the blood kin as it unquestionably did, that is to say, within the law, it applied with greater force to all classes and offenders who were outside the blood kin and were outside the law. If a stranger or an alien came within the community bounds and did not sound his horn, community law sanctioned his instant killing by anyone who met him. Men could not peaceably enter the precincts of the German tribes as late as the year 500 or 600 A.D. without being liable to instant death unless they complied with certain definite formularies. Until within five hundred years, the stranger was practically without rights in any country but his own, and might be dealt with violently by individuals or bodies of citizens. One has but to remember the tortures visited upon the Jews in all European countries with impunity to realize the truth of the doctrine of self-help when applied to strangers. There was literally no law to govern the situation. The courts did not deal with it, no penalties were provided for the restraining of individuals or of the community at large, dealing with strangers until a relatively recent time.

Is it not true that the difference in blood between the Negro and the white man has caused a survival of this notion of self-help, today illogical, unreasonable, absurd, but powerful none the less despite its technical infraction of the law of the land? Is not the lynching of a Negro or of a white man simply the old primitive self-help with the hue and cry and the execution of the victim when caught by the mob or by the sheriff's posse? There is perhaps no field of speculation so fascinating as this of the survival of bygone customs, traditions, and notions, in present society. At the same time he will be a poor and uncritical student who will not recognize the ease of erecting vast struc-

tures upon slender foundations. My purpose in this article is not to allege the necessary truth of this proposition, but, if possible, to stimulate along different lines than has been common the researches of those who are interested in the psychological attitude of the white man toward the Negro.

There will be no doubt those who will exclaim that if I am right in this analysis of the problem—indeed, if there be any reasonable modicum of truth in what I say—then the solution of the problem will be difficult in the extreme. The whole method of attack upon it will be altered. A long educational campaign will become the main feature, intended to expose the true basis of the white man's denial of real equality to the Negro race. It will look like a battle too long to be waged with courage because the victory will be far in the future. I do not agree. The attack, if properly directed, and vigorously followed up, will, like the assault of the woman suffragists upon equally ancient instinctive promptings, be unexpectedly successful. The walls of the fortress are thin and the defenders the wraiths of a dim past.

ROLAND G. USHER.